ASIA COMMERCIAL FINANCE (M) BHD.

v.

BRONLEY HILL DEVELOPMENT SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[SUIT NO. C 23-3936-86]
9 APRIL 1989

CIVIL PROCEDURE: *Application to set aside judgment in default - Judgment entered was for a sum more than what was due on the date of judgment - Order 83 r. 4(1) of the Rules of the High Court 1980 requires leave to be taken before default judgment can be entered - The rule applies only if property had been charged by principal borrower - Land charged did not belong to principal borrower - Therefore leave not required.*

This is an application to set aside judgment in default of appearance against the 1st, 2nd and 3rd defendants.

The 1st defendant is the principal borrower of a term loan facility amounting to RM1.5 million payment for which had been guaranteed by the 2nd and 3rd defendants. Apart from this guarantee the 2nd and 3rd defendants had also created a second legal charge over 3 pieces of property in favour of the plaintiff as additional security for the loan.

On 26 August 1986, the plaintiff instituted foreclosure proceedings by originating summons against the 3rd defendant but this originating summons was subsequently withdrawn on 16 April 1987 as the land had already been sold on 11 April 1987 for RM205,000.

On 19 November 1986, while the originating summons was still pending the plaintiff filed this civil suit against all three defendants and another guarantor against whom O. 14 summary judgment had been entered by consent.

On 31 December 1986, the plaintiff instituted separate foreclosure proceedings against the 2nd defendant for the sale of 2 pieces of land. The order for sale was granted on 31 December 1986 but at the hearing of the application to set aside the default judgment, the public auction had not taken place.

The defendants in their application to set aside the default judgment contended that the judgment was entered for a sum more than what was due on the date of judgment as no credit was given to the proceeds of sale of the land. Secondly it was contended that leave was required before default judgment can be entered in accordance with O. 83 r. 4(1).

The plaintiff submitted that on the date when their solicitor filed the certificate of non appearance together with the judgment in default, the land had not yet been sold and that therefore the amount in the judgment is for the full sum claimed as in the writ of summons and statement of claim.

Held:

[1] The fact that the defective judgment was first filed in the registry on 18 March 1987 and the fact that a subsequent application for summary judgment under O. 14 against the defendant for the correct sum due all adds up to the conclusion that the plaintiff had no intention to enter a judgment for a sum more than what is actually due. The Court is justified in amending the judgment to reflect the actual amount due as at the date of judgment.

[2] Where property had been charged by the principle borrower to secure a loan granted to him, the action to recover the loan is a charge action and that leave was needed before default judgment can be entered against the borrower. In this case since the lands that had been charged to secure the fixed term loan did not belong to the first defendant and that therefore this suit is not a charge action to which O. 83 r. 4(1) is applicable.

Case referred to:
Philip Securities (Pte) v. Yong Tet Miaw [1988] 3 MLJ

Legislation referred to:
Rules of the High Court 1980, O. 83 r. 4(1)
Rules of the Supreme Court 1970 [Sing], O. 19 r. 9, O. 20 r. 11

For the 1st, 2nd & 3rd defendants/applicants - Lily Teo; M/s. Yusuf Lee Pathma & Marbeck
For the plaintiff/respondent - P. Ng; M/s. Azam Malek & Soh

JUDGMENT

Siti Norma Yaakob J:

On 25 September 1987, judgment in default of appearance was entered against the 1st, 2nd and 3rd defendants (the defendants) and the proceedings before me stemmed from their application to have that judgment set aside.

The 1st defendant is sued as the principal borrower of a term loan facility amounting to RM1.5 million, payment for which had been guaranteed by the 2nd and 3rd defendants pursuant to a letter of guarantee dated 8 August 1985.

Besides the guarantee, the 2nd and 3rd defendants had also created second legal charges over 3 pieces of property in favour of the plaintiff as additional securities for the loan.

Prior to filing of this suit, and on 26 August 1986, the plaintiff had instituted foreclosure proceedings against the 3rd defendant, for the sale of one piece of land in originating summons, 31-2517-86, but this originating summons was subsequently withdrawn on 16 April 1987, as the land had already been sold on 11 April 1987 for RM205,000.

On 19 November 1986, whilst the originating summons was still pending, the plaintiff filed this civil suit against all the 3 defendants and another guarantor, against whom O. 14 summary judgment had been entered by consent.

Following the filing of this suit, and on 31 December 1986, the plaintiff also instituted separate foreclosure proceedings against the 2nd defendant for the sale of two pieces of land in originating summons, 31-3978-86. The order for sale was granted on 31 December 1986 but at the hearing of the application to set aside the default judgment, the public auction had not yet taken place.

In their application to set aside the default judgment, the defendants raised the following 2 issues:

1) The judgment was entered for a sum more than what was due as at the date of judgment, as no credit was given for the proceeds of sale of the land in OS 31-2517-86.

2) It was entered without leave as required under O. 83 r. 4(1).

The plaintiff had not disputed that the judgment was entered without discounting the RM205,000, the proceeds of sale of the one piece of land belonging to the 3rd defendant and as such the judgment was for a larger sum than that actually due. However, they have

explained that on 18 March 1987, their solicitors had filed the certificate of non-appearance together with the judgment in default in the Court registry and as that date since the land had not yet been sold, the amount stated in the judgment is for the full sum claimed as in the writ and statement of claim. The registry subsequently rejected the judgment on 4 July 1987 on the grounds that the process server did not endorse the fact of service on the 2nd defendant and as such, the papers were incomplete. The fact of this rejection is contained in a letter initialled by a clerk of the Registry dated 4 July 1987.

After complying with the letter of rejection, the plaintiff's solicitors refiled the judgment without amending the amount due to give credit for the proceeds of sale of the charged land as they were under the impression that the judgment would be backdated to the date when it was first filed on 18 March 1987. However this was not to be, as the date of judgment is given as 25 September 1987, the date when the judgment was refiled. In realising this, the plaintiff had filed an application to amend the judgment to reflect the actual amount due as at 25 September 1987 by giving credit for the proceeds of sale.

I had accepted the explanation given by the plaintiff as to how the judgment contained a sum very much more than what is due. The fact that the defective judgment was first filed in the Registry on 18 March 1987 is clear from the date entered in the praecipe stamped in the judgment and the fact that a subsequent application for summary judgment under O. 14 against the 4th defendant for the correct sum due, all adds up to the conclusion that the plaintiff had no intention to enter a judgment for a sum more than what is actually due. For that reason, I consider that the explanation given justifies the Court in amending the judgment to reflect the actual amount due as at the date of judgment. If any authority is needed, that can be found in the decision of *Philip Securities (Pte) v. Yong Tet Miaw* [1988] 3 MLJ. In that Singapore case, the same situation arose and the Court held that amendments were in order under O. 19 r. 9 and O. 20 r. 11 of the Singapore Rules of Supreme Court 1970, the provisions of which are very similar to our own O. 19 r. 9 and O. 2 r. 11.

The other issue raised by the defendants was that this suit is a charge action and that being so, leave must first be obtained under O. 83 r. 4(1), before default judgment can be entered. For this, reliance was placed on the unreported case of *Soo Hock Sion v. Public Finance Bhd.*, where the Supreme Court reversed a High Court decision that held that where property had been charged by the principal borrower to secure a loan granted to him, the action to recover the loan is not a charge action. The Supreme Court held that it is a charge action and for that reason, leave was needed before default judgment can be entered against the borrower.

On the facts of the case before me, the principal borrower is the 1st defendant. The lands that had been charged to secure the fixed term loan do not belong to the 1st defendant but to the 2nd and 3rd defendants who had charged them to the plaintiff. Since the lands charged do not belong to the 1st defendant, and following the Supreme Court's unreported decision in *Soo Hock Siong's* case, this is not a charge action to which O. 83 r. 4(1) is applicable.

Since both issues raised have been rebutted by affidavit evidence, I had dismissed the defendants' application with costs and varied the judgment in default to reflect the actual amount due after discounting the proceeds of sale.

Also found at [1989] 2 CLJ 983